In the Supreme Court of the United States

OCTOBER TERM, 1968

No.

UNITED STATES OF AMERICA, PETITIONER

v.

UNITED STATES COIN AND CURRENCY IN THE AMOUNT OF $8,674.00, DONALD ANGELINI, CLAIMANT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit, entered on April 9, 1968.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A, *infra,* pp. 11–13) is reported at 393 F. 2d 499. An earlier opinion of the court of appeals in this case is reported at 379 F. 2d 946.[1]

[1] That judgment was vacated by this Court and the case remanded for further consideration, along with *Stone* v. *United States*, 390 U.S. 204.

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JURISDICTION

The judgment of the court of appeals (App. B, pp. 14-15) was entered on April 9, 1968. On June 20, 1968, Mr. Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including September 6, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the decisions in *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62, prohibiting the criminal prosecution of individuals who properly assert the privilege against self-incrimination as a ground for non-compliance with the registration and return requirements of the federal wagering tax laws, extend to forfeiture proceedings directed against property used in violation of the same statutory provisions.

2. Whether, in any event, the new constitutional rule adopted in *Marchetti* and *Grosso* should be held to control forfeiture proceedings instituted prior to the date those cases were decided.

STATUTE INVOLVED

26 U.S.C. 7302 provides, in pertinent part:

> It shall be unlawful to have or possess any property intended for use in violating the provisions of the internal revenue laws, or regulations prescribed under such laws, or which has been so used, and no property rights shall exist in any such property. * * *

STATEMENT

In 1964 Donald J. Angelini was convicted in the United States District Court for the Northern District of Illinois for failure to register as a person engaged in the business of wagering and to pay the related occupational tax (26 U.S.C. 4411, 4412).[2] Following his conviction, a sum of $8,674, which he was carrying on his person at the time of his arrest, was forfeited under 26 U.S.C. 7302, as property intended for use in violation of the wagering tax laws. On appeal from the judgment of forfeiture, Angelini challenged the constitutional validity of the underlying wagering tax laws on the ground that they violated his privilege against self-incrimination. While the Seventh Circuit recognized that this constitutional issue was at that time pending before this Court in the *Marchetti* and *Grosso* cases (Nos. 2 and 12, 1967 Term), it affirmed the judgment of forfeiture, relying on the then-controlling authority of *United States* v. *Kahriger*, 345 U.S. 22, and *Lewis* v. *United States*, 348 U.S. 419 (*Angelini* v. *United States*, 379 F. 2d 946).

Thereafter, on January 29, 1968, this Court held in *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62, that individuals who properly assert the privilege against self-incrimination as a basis for failure to comply with the registration, occupational tax, and excise tax requirements of the wagering tax laws (26 U.S.C. 4401, 4411, 4412)

[2] That conviction was upheld in *United States* v. *Angelini*, 346 F. 2d 278 (C.A. 7), certiorari denied, 382 U.S. 838.

may not be criminally prosecuted for such non-compliance. Subsequently, the Court granted the petition for a writ of certiorari which had, in the interim, been filed by petitioner (No. 798, 1967 Term), vacated the judgment of forfeiture and remanded the case to the court of appeals for reconsideration in light of the *Marchetti-Grosso* holdings (390 U.S. 204).

Following reconsideration, the Seventh Circuit, although noting that "this is not a criminal case in which an individual's liberty is at stake" (App. A, p. 12), determined that forfeiture cases such as the instant one were nonetheless governed by the *Marchetti-Grosso* rationale. Accordingly, it reversed the district court's award of judgment in favor of the government (App. A, p. 13; 393 F. 2d at 500).

REASONS FOR GRANTING THE WRIT

The decision below represents an extension of the *Marchetti-Grosso* rationale beyond its express terms and is in direct conflict with a recent decision of the Sixth Circuit. Moreover, without any discussion of the matter, the court below applied the *Marchetti-Grosso* decisions retroactively. Serious questions are thus raised concerning the proper enforcement of the internal revenue laws with regard to forfeiture proceedings which, in our view, justify review by this Court.

1. The *Marchetti-Grosso* decisions did not hold the wagering tax laws unconstitutional. In the concluding paragraph of the *Marchetti* opinion, the Court stated (390 U.S. at 61):

> We emphasize that we do not hold that these wagering tax provisions are as such constitutionally impermissible; we hold only that those who properly assert the constitutional privilege as to these provisions may not be criminally punished for failure to comply with their requirements. * * *

Accordingly, a person who engages in the business of accepting wagers remains in violation of the wagering tax laws if he fails to register or pay the prescribed taxes. Although he cannot be punished criminally for such non-compliance, the occupational and excise taxes can still be collected in a civil proceeding.[3] We submit that it is equally consistent with the rationale of *Marchetti-Grosso* that property used in violation of those provisions is forfeitable under 26 U.S.C. 7302.

In the instant case the court reasoned that since violations of the wagering tax laws may no longer be punished directly, "[i]t follows that they should not be punished indirectly through forfeiture" (App. A, p. 13). The court overlooked, however, that proof that the property was intended for use in wagering depends on evidence apart from any required declaration in connection with payment of the prescribed taxes, and that it is immaterial whether the person whose property is seized for such use is the one who

[3] Indeed, in the *Grosso* opinion the Court explicitly noted that it was not holding "either that the excise tax is as such constitutionally impermissible, or that a proper claim of privilege extinguishes liability for taxation," but "only that such a claim of privilege precludes a criminal conviction premised on failure to pay the tax" (390 U.S. at 70, n. 7).

must pay the taxes. Forfeiture proceedings are *in rem*, not *in personam*, in character, and are directed against the offending property, not an individual. In short, the court failed to recognize the peripheral relationship of the personal privilege against self-incrimination to proceedings to forfeit property.[4]

The decision below squarely conflicts with that of the Sixth Circuit in *United States* v. *One 1965 Buick*, 392 F. 2d 672 (Appendix C, *infra*, pp. 15–21), in which a petition for rehearing was denied on July 19, 1968 (Appendix D, *infra*, pp. 22–24). In that case the Sixth Circuit held that the government could properly forfeit some $305,633 used by the claimants in violation of the wagering tax laws even though a criminal prosecution for the violation of such provisions would be barred by a proper claim of privilege. In reaching this result the Sixth Circuit relied upon the civil nature of forfeiture proceedings and the explicit statements in *Marchetti* and *Grosso* that the wagering tax statutes were constitutional (App. C, pp. 18–20). It interpreted *Marchetti* and *Grosso* as holding only that *criminal prosecutions* under such statutes were barred by the proper assertion of the Fifth Amendment privilege (App. C, p. 19).

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[4] Neither *Boyd* v. *United States*, 116 U.S. 616, nor *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, relied upon by the court of appeals (App. A, p. 13), requires the result it reached. In each of those cases the effort to sustain the forfeiture involved an affirmative violation of a constitutional protection—in the *Plymouth* case by the use, in the forfeiture proceedings, of illegally obtained evidence, and in *Boyd* by requiring the production of allegedly incriminating private papers under a statute which permitted judgment against the defendant for failure to comply.

As a consequence of these two conflicting interpretations, considerable uncertainty has been created in the administration of the internal revenue laws with regard to forfeitures of property used in violation of the wagering tax laws, and, moreover, to forfeitures generally. Not only is the question presented an important one, but the present confusion for enforcement officials and those subjected to forfeitures is of sufficient magnitude to warrant resolution. Only this Court can provide a definitive resolution of the existing conflict, particularly since the issue involved turns on a proper construction of this Court's *Marchetti-Grosso* decisions. Accordingly, plenary consideration in the instant case seems appropriate.

2. Apart from the conflict among circuits, this case also raises a substantial question regarding retroactivity, since the court below, without discussion, applied *Marchetti-Grosso* to forfeiture proceedings instituted before those cases were decided. Thus, even if this Court were to decide that the *Marchetti-Grosso* rationale applied to forfeitures, the question would still remain as to whether those decisions should be given retrospective application to cases in the courts on the date when the *Marchetti-Grosso* decisions were rendered.

As recent decisions of this Court have established, where a newly adopted constitutional rule does not bear on the integrity of the guilt-determining process, its retroactivity *vel non* should turn upon considerations relating to the purpose to be served by the new rule, governmental reliance upon the prior rule, and the effect upon the administration of justice if the

new rule were held to control pending cases. *Linkletter* v. *Walker*, 381 U.S. 618; *Tehan* v. *Shott*, 382 U.S. 406; *Johnson* v. *New Jersey*, 384 U.S. 719; *Stovall* v. *Denno*, 388 U.S. 293; *DeStefano* v. *Woods*, No. 559, 1967 Term (decided June 17, 1968, together with *Carcerano* v. *Gladden*, No. 941, 1967 Term); cf. *Roberts* v. *Russell*, No. 920 Misc., 1967 Term (decided June 10, 1968). In our view, these considerations militate against a rule of retroactivity with regard to forfeiture proceedings arising out of wagering tax violations.

In seizing property used in violation of the internal revenue laws, government agents have obviously relied upon the prior decisions of this Court specifically upholding the validity of the wagering tax statutes. *United States* v. *Kahriger*, 345 U.S. 22; *Lewis* v. *United States*, 348 U.S. 419. Moreover, the new rule adopted in *Marchetti-Grosso* would not be measurably furthered by a retroactive application of those decisions to forfeiture cases. The evident purpose of the *Marchetti-Grosso* holdings is to prevent the criminal prosecution of individuals who, because of the risk of incrimination that compliance with the wagering tax laws would entail, have failed to comply with those provisions. Forfeiture proceedings are directed against property, not people. And, as already noted, proof of wagering warranting forfeiture is independent of proof of non-payment of the prescribed taxes. While non-payment must be shown, proof that the owner of the property was himself the person liable for the taxes is not necessarily required. In short, the impact of a forfeiture on the

privilege against self-incrimination is at most collateral and indirect.

We have not urged the non-retroactivity of *Marchetti-Grosso* with respect to criminal prosecutions which had not yet become final at the time those decisions were rendered. We believe, however, that a different result is justified in forfeiture proceedings where no individual is charged with crime and no criminal conviction results. In such circumstances, neither the purpose underlying *Marchetti-Grosso* nor the proper administration of justice would be served by giving those decisions retroactive effect in pending cases.

CONCLUSION

The decision below raises serious questions concerning the enforcement of the internal revenue laws with regard to forfeitures which we believe require resolution by this Court. It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

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SEPTEMBER 1968.

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APPENDIX A

In the United States Court of Appeals
for the Seventh Circuit

SEPTEMBER TERM, 1967 APRIL SESSION, 1968

No. 15502

UNITED STATES OF AMERICA, LIBELANT-APPELLEE

v.

UNITED STATES COIN AND CURRENCY IN THE AMOUNT OF $8,674.00, RESPONDENT

DONALD ANGELINI, CLAIMANT-APPELLANT

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

April 9, 1968

Before KILEY, FAIRCHILD and CUMMINGS, *Circuit Judges.*

PER CURIAM. When our opinion was released herein, the Supreme Court had not yet decided *Marchetti* v. *United States,* 390 U.S. 39, and *Grosso* v. *United States,* 390 U.S. 62, so that we decided claimant's constitutional argument on the authority of *United States* v. *Kahriger,* 345 U.S. 22, and *Lewis* v. *United States,* 348 U.S. 419. See 379 F. 2d 946.

After the Supreme Court's opinions were announced in the *Marchetti* and *Grosso* cases, certiorari was granted and our judgment was vacated. U.S. *Grosso* does not involve Sections 4411 and 4412 of the Internal Revenue Code, the provisions involved here. In *Marchetti,* the Court concluded with this admonition (390 U.S. at p. 61):

> "We emphasize that we do not hold that these wagering tax provisions [26 U.S.C. §§ 4411 and 4412] are as such constitutionally impermissible; we hold only that those who properly assert the constitutional privilege as to these provisions may not be *criminally* punished for failure to comply with their requirements." (Emphasis supplied.)

Because this is not a criminal case in which an individual's liberty is at stake, there is a question as to whether *Marchetti* is applicable.

The respondent monies were declared forfeit pursuant to 26 U.S.C. § 7302, which provides that "no property rights shall exist in * * * property" used "in violating the provisions of the internal revenue laws." The only provisions of the internal revenue laws which can support forfeiture here are 26 U.S.C. §§ 4411 and 4412.[1]

Marchetti holds that compliance with §§ 4411 and 4412 subjects the taxpayer to

> "'real and appreciable,' and not merely 'imaginary and unsubstantial,' hazards of self-incrimination" (390 U.S. at p. 48).

Claimant Angelini would have subjected himself to exactly the same hazards by complying. In this respect, *Marchetti* and this case are the same. But the consequences of noncompliance are not the same in

[1] The applicability of 26 U.S.C. § 4901, which was cited by the District Court, is dependent solely on the §§ 4411 and 4412 violations. Therefore, it need not be considered separately.

the two cases. The prospect of a felony conviction involved in *Marchetti* of course has a greater coercive effect than the possible loss of money involved herein. On the other hand, the prospect of losing in excess of $8,000 has a substantial coercive effect. In this respect, the landmark case of *Boyd* v. *United States*, 116 U.S. 616, is controlling. *Boyd* was a civil forfeiture action in which the claimant was given a choice between producing a possibly incriminating document and forfeiting the property. The Court held that such a choice was impermissible under the Fourth and Fifth Amendments. See *Garrity* v. *New Jersey*, 385 U.S. 493, 496–497, which reaffirms and follows *Boyd*.

The only apparent purpose of 26 U.S.C. § 7302, as applied here, is to punish violators of Sections 4411 and 4412 of the Internal Revenue Code by taking away money used in committing the violations. See *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 700. As a practical matter, *Marchetti* means that such violations are no longer punishable directly. It follows that they should not be punished indirectly through forfeiture.

Accordingly, the judgment of the District Court is reversed and the cause is remanded for the entry of an appropriate judgment for claimant-appellant.

APPENDIX B

JUDGMENT

United States Court of Appeals for the Seventh Circuit

No. 15502

UNITED STATES OF AMERICA, LIBELANT-APPELLEE,

v.

UNITED STATES COIN AND CURRENCY IN THE AMOUNT OF $8,674.00, RESPONDENT AND DONALD ANGELINI, CLAIMANT-APPELLANT

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

Tuesday, April 9, 1968

Before ROGER J. KILEY, THOMAS E. FAIRCHILD and WALTER J. CUMMINGS, *Circuit Judges.*

This appeal now comes before the Court subsequent to the filing of the judgment of the Supreme Court of the United States vacating the previous judgment entered by this Court on June 27, 1967, and remanding this cause to this Court for further consideration.

It is hereby ordered that the mandate of this Court heretofore issued to the United States District Court for the Northern District of Illinois, Eastern Division,

on August 18, 1967, be, and the same is hereby recalled.

It is further ordered and adjudged by this Court that the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, entered in this cause be, and the same is hereby reversed, and this cause is hereby remanded to the said District Court for the entry of an appropriate judgment for claimant-appellant, in accordance with the opinion of this Court filed this day.

APPENDIX C

No. 17559

United States Court of Appeals
Sixth Circuit

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ONE 1965 BUICK, ETC. ET AL., DEFENDANTS

WILBUR DEAN AND DELORES DEAN, CLAIMANTS-APPELLANTS

Appeal from the United States District Court for the Northern District of Ohio, Eastern Division

Decided April 17, 1968

Before WEICK, *Chief Judge*, and EDWARDS and MCCREE, *Circuit Judges*.

WEICK, *Chief Judge*.

This appeal involves questions arising out of the forfeiture of property used in the operation of a numbers business, in violation of the Internal Revenue laws.

The United States filed a libel of information in the District Court to condemn the property which consisted of $305,633.25 in cash, a package contain-

ing an unknown amount of currency, three Buick automobiles, and three adding machines.

The property had been seized by Special Agents of the Internal Revenue Service in a search of the residence of appellants, Wilbur and Delores Dean, pursuant to the authority of search warrants which authorized the search of the residence and four automobiles.

The libel alleged that the Deans and other persons engaged in and carried on the business of accepting wagers without having first paid the special occupational tax imposed on such business, and without registering the business as required by law[1]; that while so engaged said property was used and was intended for use in violation of the Internal Revenue laws; and that by reason thereof, said property became and is the property of the United States under the provisions of Section 7302 of Title 26, U.S.C.

Appellants filed answers, denying the material allegations of the libel. They also filed a claim to the property. Wilbur Dean filed a motion to suppress, the ground of the motion to suppress being that the search and seizure were illegal, in violation of his Fourth and Fifth Amendment rights.

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[1] The applicable statutory provisions are as follows:

26 U.S.C. § 4411 provides in pertinent part:

"There shall be imposed a special tax of $50 per year to be paid by each person who * * * is engaged in receiving wagers * * *"

26 U.S.C. § 4412 provides in part:

"Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district— * * *"

26 U.S.C. § 4901 provides in pertinent part:

"No person shall be engaged in or carry on any trade or business subject to the tax imposed by section 4411 * * * until he has paid the special tax therefor."

Pursuant to a stipulation of the parties, the motion to suppress and the trial of the libel were heard together. The trial lasted eight days, at the conclusion of which the District Judge delivered his opinion, which is contained in eleven pages of the printed record. He adopted findings of fact and conclusions of law. He found that the allegations contained in the libel were sustained by the evidence, and ordered the property condemned by decree of forfeiture and turned over to the United States. He denied the motion to suppress.

It is contended on appeal that the federal wagering tax statutes which formed the basis for issuance of the search warrants and seizure of the property sought to be forfeited, are unconstitutional.

An analysis of this claim must begin with the forfeiture statute itself. 26 U.S.C. § 7302 provides in part:

> "It shall be unlawful to have or possess any property intended for use in violating the provisions of the internal revenue laws * * * and no property rights shall exist in any such property."

The primary purpose of the statute is the protection of the revenue through the effective enforcement of the revenue laws. *Florida Dealers & Growers Bank* v. *United States*, 279 F. 2d 673, 676 (5th Cir. 1960); *United States* v. *One 1950 Ford Half-Ton Pickup Auto Truck, etc.*, 195 F. 2d 857, 859 (6th Cir. 1952); *United States* v. *Windle*, 158 F. 2d 196, 199 (8th Cir. 1946). A reading of the language of the statute, in the light of the purpose for its existence, leads to the conclusion that it outlaws any property used or intended for use inviolating the Internal Revenue laws and sanctions forfeiture thereof. However, if the wagering tax statutes are unconstitutional, as the

appellants insist, then there would be no revenue law violation upon which to predicate the forfeiture.

When the case was tried in the District Court it was governed by two decisions of the Supreme Court, which upheld the constitutionality of the wagering statutes here involved. *Lewis* v. *United States,* 348 U.S. 419, 75 S.Ct. 415, 99 L.Ed. 475 (1955) and *United States* v. *Kahriger,* 345 U.S. 22, 73 S.Ct. 510, 97 L.Ed. 754 (1953). Shortly before the appeal was argued, the Supreme Court decided *Marchetti* v. *United States,* 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed. 2d 889 (1968) and *Grosso* v. *United States,* 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed 2d 906 (1968), in which convictions for violating the wagering statutes were set aside because they were in violation of the accused's Fifth Amendment privilege against self-incrimination.

Appellants rely on these decisions and contend that since they cannot be convicted on a criminal charge for violation of the wagering statutes if they assert their privilege against self-incrimination, their property ought not be subject to forfeiture for the same violation. In our judgment this does not follow.

The mere fact that an exclusionary rule of evidence may prevent a conviction for the criminal offense of violating the Internal Revenue laws, does not expunge civil liability for payment of the tax.

There can be no question but that Congress has power to tax unlawful activities. The fact that a business is unlawful does not exempt it from payment of taxes. *United States* v. *Sullivan,* 274 U.S. 259, 47 S.Ct. 607, 71 L.Ed. 1037 (1927).

The Supreme Court in *Marchetti* did not hold that the wagering tax statutes as such were unconstitutional. The Court endeavored to make crystal clear that Congress had the constitutional power to enact such legislation. In *Marchetti,* the Court said:

> "The Court has repeatedly indicated that the unlawfulness of an activity does not prevent its taxation, and nothing that follows is intended to limit or diminish the vitality of those cases."

In *Marchetti* the Court further said:

> "We do not, as we have said, doubt Congress' power to tax activities which are, wholly or in part, unlawful.
>
> "* * * Accordingly, nothing we do today will prevent either the taxation or the regulation by Congress of activities otherwise made unlawful by state or federal statutes.
>
> "* * * We emphasize that we do not hold that these wagering tax provisions are as such constitutionally impermissible; we hold only that those who properly assert the constitutional privilege as to these provisions may not be criminally punished for failure to comply with their requirements. If, in different circumstances, a taxpayer is not confronted by substantial hazards of self-incrimination, or if he is otherwise outside the privilege's protection, nothing we decide today would shield him from the various penalties prescribed by the wagering tax statutes."

Finally, appellants' contention is explicitly answered by the Supreme Court in *Grosso,* where the Court stated in footnote 7:

> "Section 4411 provides that the occupational tax must be paid 'by each person who is liable for tax under section 4401' and by each person who receives wagers for one liable under § 4401. It might therefore be argued that since petitioner is entitled to claim the constitutional privilege in defense to a prosecution for willful failure to pay the excise tax, he is thereby freed from liability for the occupational tax. We cannot accept such an argument. We do not hold today either that the excise tax is as

such constitutionally impermissible, or that a proper claim of privilege extinguishes liability for taxation; we hold only that such a claim of privilege precludes a criminal conviction premised on failure to pay the tax."

* * * * *

Affirmed.

APPENDIX D

No. 17559

United States Court of Appeals
for the Sixth Circuit

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ONE 1965 BUICK, ETC., ET AL., DEFENDANTS

WILBUR DEAN AND DELORES DEAN,
CLAIMANTS-APPELLANTS

On Petition for Rehearing.

Decided July 19, 1968.

Before WEICK, *Chief Judge*, EDWARDS and MCCREE, *Circuit Judges*.

WEICK, *Chief Judge*. Appellants ground their petition for rehearing on *Angelini* v. *United States*, F. 2d (7th Cir. 1968).

We consider *Grosso* and *Marchetti* in a different "light" than did the Seventh Circuit. As we pointed out in our opinion, the Supreme Court limited its holding to criminal cases. The Court approved its previous decisions in *License Tax Cases*, 72 U.S. 462 (5 Wall) (1866), and *United States* v. *Sullivan*, 274 U.S. 259 (1927), which upheld the power of Congress

to tax unlawful activities. It is not for us to extend *Grosso* and *Marchetti* to civil cases and thereby exempt from taxation persons who derive their income from unlawful activities because they assert their Fifth Amendment rights in a criminal case. There is such a thing as an obligation to pay the excise tax. Even though such a person may not be convicted for criminal violation, because of exclusionary rules of evidence, he still remains civilly liable for the tax.

The statute (26 U.S.C. § 7302) makes it unlawful to have or possess any property intended for use in violating the internal revenue laws, and no property rights exist in such property. The forfeiture action is in rem against the property so used. *Various Items v. United States*, 282 U.S. 577 (1931).

The evidence disclosed a large-scale numbers operation by the Deans using their residence as a "bank" and "clearing house". The "bank" consisted of wagers placed by bettors with the Deans and was a fund amounting to $305,632.25 in cash available to pay off the winners.

Mr. Dean told the agents, as the District Court found, that he was the banker and he did not pay the occupational tax or the ten percent excise tax. He gave as a reason for not paying the excise tax that he could not afford to pay it because it came off the top. The court further found that the funds in the "bank" did not belong to the Deans but were merely gambling money in their custody.

The District Court found that the property seized was intended to be used and was used in violation of the internal revenue laws. There was abundant evidence to support this finding and it justified the order of forfeiture. Lotteries are also prohibited by the Constitution of Ohio and Ohio statutes which impose

criminal penalties for engaging in such activities. Art. XV § 6 Const. of Ohio; Ohio Rev. Code ch. 2915 (1953).

We do not regard *Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693 (1965), as apposite. It involved a search without a warrant which the state court determined was without probable cause. The forfeiture there depended upon the admission of illegally obtained evidence in violation of the Fourth Amendment as applied to the state by the Fourteenth Amendment. In the present case, the arrest was lawful and the search was pursuant to the authority of warrants which we have held to be valid. No illegally obtained evidence was admitted in the forfeiture proceeding. It is not necessary that there be a criminal conviction in order to support the forfeiture. *Various Items* v. *United States, supra; cf. Murphy* v. *United States*, 272 U.S. 630 (1926).

In any event, the property forfeited was found to be contraband and appellants are not entitled to have it returned to them. *United States* v. *Jeffers*, 342 U.S. 48 (1951); *Trupiano* v. *United States*, 334 U.S. 699 (1948); *United States* v. *One Ford Coupe*, 272 U.S. 321 (1926); *United States* v. *Deane Hill Country Club, Inc.*, 342 F.2d 794 (6th Cir.), cert. denied, 381 U.S. 937 (1965); *United States* v. *$1,058.00 in United States Currency*, 323 F.2d 211 (3rd Cir. 1963).

We do not believe that the District Court should be required to determine the beneficial owners of the "bank" whose wagers constituted the fund available for pay-offs. The agents seized no money or property of the Deans which was not intended for use or used in violating the internal revenue laws.

The petition for rehearing is denied.

U.S. GOVERNMENT PRINTING OFFICE: 1966